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13

14 UNITED STATES DISTRICT COURT

15 FOR THE CENTRAL DISTRICT OF CALIFORNIA

16 UNITED STATES OF AMERICA,

17 Plaintiff,

18 v.

19 JOHN JACOB OLIVAS,

20 Defendant.
21
22

No. ED CR 18-231-JGB

GOVERNMENT'S MOTION IN LIMINE
NO. 2 TO EXCLUDE EVIDENCE OF
DEFENDANT'S ALLEGED PRIOR GOOD
ACTS

Hearing Date: August 23, 2021

Hearing Time: 2:00 P.M.

Location: Courtroom of the
Hon. Jesús G. Bernal

23 Plaintiff United States of America, by and through its counsel
24 of record, the Acting United States Attorney for the Central District
25 of California and Assistant United States Attorneys Eli A. Alcaraz
26 and Frances S. Lewis hereby files its Motion in Limine No. 2 to
27 Exclude Evidence of Defendant's Prior Good Acts under Federal Rules
28 of Evidence 402, 403, 404, and 405.

1 This Motion is based upon the attached memorandum of points and
2 authorities, the files and records in this case, and such further
3 evidence and argument as the Court may permit.

4 Dated: July 19, 2021

Respectfully submitted,

5 TRACY L. WILKISON
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9 Chief, Criminal Division

10 /s/ Frances S. Lewis

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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

In 2011 and 2012, defendant John Jacob Olivas ("defendant") used his position and power as a federal law enforcement agent to sexually abuse his victims and prevent them from reporting his sexual assaults in violation of their constitutional rights. At the time, defendant was a Special Agent with Homeland Security Investigations ("HSI") of the U.S. Immigration and Customs Enforcement in San Bernardino, California. Defendant used not only his official position, but also acts of violence and threatening words to instill pervasive fear in his victims. The abuse of his position and this fear were designed to prevent them from reporting defendant's assaults, and he was successful. For this conduct, defendant is charged with three counts of deprivation of rights under color of law in violation of 18 U.S.C. § 242.

II. ARGUMENT: THE COURT SHOULD EXCLUDE TESTIMONY OF ALLEGED SPECIFIC PRIOR GOOD ACTS OF DEFENDANT AT TRIAL¹

At trial, the government anticipates that defendant may try to introduce evidence of his prior "good" acts in an effort to paint himself in a more positive light in front of the jury.² These acts could include his service in the armed forces, positive performance evaluations, certificates of appreciation, the absence of other disciplinary complaints, or other specific acts relating to his job

¹ For a fuller recitation of the Statement of Facts and Procedural History of the case, the government incorporates by reference those sections from the government's Motion in Limine No. 1 filled concurrently herewith.

² The government conferred with defense counsel prior to filing the instant motion. Defendant has not disclosed what, if any, character evidence defendant will seek to introduce at trial.

1 performance or good character. Defendant may try to introduce this
2 evidence during opening statement, on cross-examination, or during
3 his case-in-chief. This evidence is improper character evidence
4 under Federal Rules of Evidence 404 and 405 and should be excluded.³

5 In particular, the government understands that defendant served
6 in the armed forces and received an honorable discharge upon
7 completion of his service. For the reasons herein, defendant's
8 service, including any awards, injuries in the line of duty, or acts
9 of heroism, as well as any other purported good acts such as positive
10 performance reviews as an HSI special agent or the absence of
11 disciplinary action, are inadmissible under Rules 404 and 405. They
12 are also unfairly prejudicial under Rule 403.

13 **A. Evidence of Alleged Specific Good Acts Is Inadmissible**

14 The Supreme Court has recognized that character evidence --
15 particularly cumulative character evidence -- has weak probative
16 value and great potential to confuse the issues and prejudice the
17 jury. Michelson v. United States, 335 U.S. 469, 480, 486 (1948).
18 The Supreme Court thus has given trial courts wide discretion to
19 limit the presentation of character evidence. Id. at 486; United
20 States v. Pintado-Isiordia, 448 F.3d 1155, 1158 (9th Cir. 2006)
21 (agreeing with district court that "the only apparent purpose" for
22 introducing a photograph of defendant in military uniform was "to
23 elicit the jury's sympathy and patriotism, which runs afoul of Fed.
24 R. Evid. 403").

25 _____
26 ³ Much of this type of evidence, such as performance evaluations
27 or letters of commendation, may also be inadmissible hearsay. United
28 States v. Barry, 814 F.2d 1400, 1404, (9th Cir. 1987) (finding that
evidence of prior acts under Federal Rule of Evidence 404 and 405
must be offered in a form admissible under the Federal Rules; letters
of commendation were hearsay).

1 Rule 404(a)(1) requires that character evidence must relate to a
2 "pertinent trait." Evidence, for example, that defendant received
3 commendations or certificates of appreciation or that he performed
4 good work as a federal agent or acts of heroism during military
5 service is not relevant to any pertinent trait at issue in this case.
6 See, e.g., United States v. Hedgcorth, 873 F.2d 1307, 1313 (9th Cir.
7 1989) (evidence of defendant's role as government intelligence
8 officer properly excluded where offered to show that defendant was
9 "patriotic," "pro-government," and unlikely to engage in acts of
10 terrorism); see also United States v. Washington, 106 F.3d 983, 1000-
11 01 (D.C. Cir. 1997) (police officer's commendations were not
12 admissible because his performance as a police officer was neither
13 "pertinent" to nor an essential element of the charged offenses, even
14 where the government had introduced evidence of prior bad acts to
15 prove knowledge, intent, and predisposition); United States v.
16 Nazzaro, 889 F.2d 1158, 1168 (1st Cir. 1989) (evidence of officer's
17 prior commendations were properly excluded because "the traits which
18 they purport to show -- bravery, attention to duty, perhaps community
19 spirit -- were hardly 'pertinent' to the crimes [charged]").

20 Indeed, evidence alleging defendant's specific good acts would
21 be offered only to demonstrate that defendant was a competent law
22 enforcement officer who would not abuse his position, or that
23 defendant was a "good person," which would only serve to mislead the
24 jury into believing that defendant could not have committed the
25 serious crimes charged because of his general "good" character.
26 Thus, such evidence should be excluded under Rule 404(a)(1).
27 Hedgcorth, 873 F.2d at 1313; see also United States v. Ellisor, 522
28 F.3d 1255, 1270 (11th Cir. 2008) (defendant who sold tickets to

1 Christmas show that never took place was properly precluded from
2 offering evidence of other non-fraudulent shows); United States v.
3 Heidecke, 900 F. 1155, 1162 (7th Cir. 1990) (failure to find evidence
4 of misconduct in public official's file other than the charged
5 misconduct was not admissible).

6 Moreover, even if such character traits were relevant, the form
7 of the character evidence must be proper. Federal Rule of Evidence
8 405(a) sets forth the sole methods by which character evidence may be
9 introduced. Rule 405(a) states that where evidence of a character
10 trait is admissible, proof may be made in two ways: (1) by testimony
11 as to reputation; and (2) by testimony as to opinion. Accordingly,
12 if a defendant wishes to introduce pertinent character evidence, he
13 must do so through reputation or opinion testimony only. Hedgcorth,
14 873 F.2d at 1313 ("[W]hile a defendant may show a character for
15 lawfulness through opinion or reputation testimony, evidence of
16 specific acts is generally inadmissible." (citations omitted));
17 United States v. Camejo, 929 F.2d 610, 613 (9th Cir. 1991) (evidence
18 of specific instances is not admissible to prove the defendant's good
19 character); United States v. Solomon, 686 F.2d 863, 874 (11th Cir.
20 1982) (evidence of a defendant's military history is inadmissible to
21 prove a defendant's good character, as character evidence must be in
22 the form of opinion of reputation testimony); French v. United
23 States, 232 F.2d 736 (5th Cir. 1956) (evidence of specific facts like
24 battle citations not permissible to show good character).

25 Defendant may not introduce specific instances of his purported
26 character to be law-abiding or of any otherwise peaceful nature,
27 although he may offer reputation or opinion testimony on the subject.
28 United States v. Diaz, 961 F.2d 1417, 1418 (9th Cir. 1992) (holding

1 defendant's character witnesses could testify that defendant was law-
 2 abiding but not concerning belief of defendant's specific character
 3 as being non-prone to committing drug deals); see Michelson, 335 U.S.
 4 at 476-77 (holding that while a defendant may show a character for
 5 lawfulness through opinion or reputation testimony, evidence of
 6 specific acts is generally inadmissible).

7 Evidence that defendant lacks a history of prior bad acts also
 8 does not constitute evidence of a pertinent character trait, and must
 9 be excluded. United States v. Barry, 814 F.2d 1400, 1403 (9th Cir.
 10 1987) ("[T]estimony as to the lack of prior bad acts is, in essence,
 11 testimony as to the multiple instances of good conduct, and its
 12 admission would appear to violate a strict reading of Rule 405(a)."
 13 (internal quotation marks omitted)); see also United States v.
 14 Scarpa, 913 F.2d 993, 1010 (2d Cir. 1990) ("A defendant may not seek
 15 to establish his innocence, however, through proof of the absence of
 16 criminal acts on specific occasions."). Any admissible character
 17 evidence must also have a temporal proximity to the charged offenses
 18 to be relevant under Rule 403. Barry, 814 F.2d at 1404 (citations
 19 omitted).

20 **B. If the Court Admits Opinion or Reputation Testimony, the**
 21 **Government Should Be Permitted to Rebut Such Testimony with**
 22 **Specific Bad Acts**

23 If the Court permits defendant to introduce reputation or
 24 opinion testimony about his good character, the government must be
 25 allowed to rebut such testimony with evidence of defendant's prior
 26 bad acts.⁴ United States v. McGuire, 744 F.2d 1197, 1204 (9th Cir.
 27 1984) (stating that it is well-settled that "[o]nce the defendant has

28 ⁴ The government is separately moving to admit certain prior bad
 acts by defendant under Rule 413, or in the alternative, Rule 404(b).

1 'opened the door' by offering evidence as to his good character, the
2 prosecution may rebut that evidence"). The government may do so
3 through cross-examination of defendant's witnesses or through its own
4 rebuttal witnesses. For example, once the door is opened, the
5 government may elicit from rebuttal witnesses or on cross-examination
6 that defendant has a bad character or reputation "to show that
7 damaging rumors, whether or not well-grounded, were afloat -- for it
8 is not the man that he is, but the name that he has which is put in
9 issue." Michelson, 335 U.S. at 479.

10 Similarly, if defendant introduces such reputation or opinion
11 testimony as to his peacefulness or law-abiding nature, the
12 government will be entitled to cross-examine by asking about specific
13 instances indicating contrary tendencies of defendant, including
14 prior convictions. See United States v. Castillo, 181 F.3d 1129,
15 1133-34 (9th Cir. 1999). Such cross-examination is proper to test
16 whether the witness truly has knowledge of a defendant's reputation
17 and also to determine whether that knowledge influences his or her
18 opinion in any way. United States v. Edwards, 549 F.2d 362, 367 (5th
19 Cir. 1981).

20 Finally, to be clear, if defendant decides to testify, like any
21 witness, the government may elect to produce rebuttal character
22 evidence as to that defendant's veracity regardless of whether
23 defendant introduces opinion or reputation evidence of good
24 character. Fed. R. Evid. 608(a); United States v. Melton, 739 F.2d
25 576, 576-89 (11th Cir. 1984) ("By choosing to testify, [the
26 defendant] placed his credibility in issue as does any other
27 witness.").

1 **III. CONCLUSION**

2 For the foregoing reasons, the government respectfully requests
3 that this Court grant the government's motion in limine and preclude
4 defendant from introducing testimony or evidence about his alleged
5 good character or prior acts tending to demonstrate the same.
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